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No. 03-9877

Supreme Court, U.S.
FILED
DEC 20 2004
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IN THE

Supreme Court of the United States

JON B. CUTTER, *et al.*,

Petitioners,

v.

REGINALD WILKINSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici Curiae States of New York and Washington urge reversal of the decision of the United States Court of Appeals for the Sixth Circuit in *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003). That decision struck down section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, which prohibits states from imposing a substantial burden on the religious exercise of a prisoner or other institutionalized person unless the imposition is the least restrictive means of furthering a compelling government interest. The court held that this provision has the primary effect of advancing religion in violation of the Establishment Clause of the First Amendment because it gives religious prisoners superior rights in the prison community and encourages prisoners to become religious. 349 F.3d at 264-67.

Amici States have a strong interest in ensuring that state prisons are operated safely and effectively. They also believe that federal courts should defer to state prison administrators' expertise in the day-to-day operation of prison systems. At the same time, Amici States value the religious liberty of all of their citizens, including those who are incarcerated. Religious tolerance is among the foundations of our society, and religious accommodation "follows the best of our traditions" by promoting respect for individuals' freedom of conscience. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Amici States believe that they should be free to remove unnecessary state-imposed burdens on their citizens' religious practice, even if not required to do so by the Constitution.

New York, for example, allows a religious organization to give preference to members of its religion, notwithstanding

the general law against discrimination. N.Y. Executive Law § 296(11). Similarly, it provides sequestered jurors with food that meets their religious dietary requirements. N.Y. Judiciary Law § 519-a. And it allows voters who have religious objections to polling places located in churches to vote elsewhere. N.Y. Election Law § 11-300. Indeed, at least a dozen states have adopted measures, including some similar to RLUIPA, to ensure that state action burdening a religious practice is the least restrictive means of achieving a compelling state interest.[1] If the government could not review its own actions to eliminate substantial burdens on religious practices, the constitutionality of these state laws would be called into question.

Amici States believe that when properly construed, section 3 of RLUIPA strikes a workable balance between the interests in safe and effective prisons on the one hand and religious freedom on the other. While promoting accommodation of prison inmates' religious practices, section

1. These states include Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. *See* Ala. Const. Amend. 622; Ariz. Rev. Stat. § 41-1493.01; Conn. Gen. Stat. § 52-571b; Fla. Stat. Ann. § 761.03; Idaho Code § 73-402; 775 Ill. Comp. Stat. Ann. 35/15; N.M. Stat. Ann. § 28-22-3; Okla. Stat. Ann. tit. 51, § 253; Pa. Stat. tit. 71, § 2404; R.I. Gen. Laws § 42-80.1-3; S.C. Code Ann. § 1-32-40; Tex. Civ. Prac. & Rem. Code Ann. § 110.003. A number of other states, including Alaska, Massachusetts, Washington, and Wisconsin, have adopted a similar rule judicially. *E.g.*, *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Munns v. Martin*, 930 P.2d 318 (Wash. 1997); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996).

3 properly requires courts to defer to the considered judgment of prison administrators in assessing the feasibility of any requested accommodation. As Amici States interpret the provision, prison administrators do not need to provide accommodations that would compromise the prison's interests in order, security, discipline, or a host of other vital institutional concerns.

Undeniably, as the State of Ohio's submission below suggests, section 3 of RLUIPA has generated frivolous suits by prisoners, a burden all states bear. This litigation burden is exacerbated when some lower courts disregard Congress's intent that they defer to the experience and expertise of prison administrators. The solution, however, is not to hold that section 3 violates the Establishment Clause on its face, which would have far-reaching consequences for religious accommodation generally. Legislation such as the Prison Litigation Reform Act of 1995, when applied consistently, will deter frivolous suits. Guidance from this Court on the scope of section 3, and the proper way to balance the competing interests addressed by the provision, will also minimize the states' burden in RLUIPA litigation without compromising prison administrators' ability to accommodate genuine religious practices.

SUMMARY OF ARGUMENT

This Court has long approved of voluntary efforts by states to accommodate the religious practices of their citizens. Accommodation falls within the "play in the joints," *Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307, 1311 (2004), between what the Free Exercise Clause commands and what the Establishment Clause forbids. When the state goes beyond the minimum required by the Free Exercise Clause and lifts

government-imposed burdens on religious exercise, the Establishment Clause does not require that it simultaneously provide benefits to non-religious activities.

Properly construed, section 3 does not endorse religion. It does not promote religious practices that are unburdened by government rules, discriminate among religious sects, demand accommodations that unduly burden other prisoners or the prison system, or require accommodations that would induce prisoners to adopt religious beliefs. The Sixth Circuit vastly overstated the scope of section 3's duty to accommodate when it speculated that the provision would encourage prisoners to become religious to enjoy greater rights.

The scope of section 3 is also limited in another important way. Congress intended the courts to defer to the experience and judgment of state prison administrators in determining what accommodations are feasible in the prison setting. There is a long tradition of deference on prison matters that, when applied faithfully, minimizes the burden of section 3 litigation on the states. The legitimate concerns about security and resources that Ohio raises are fully addressed by application of section 3's flexible balancing test in a manner that reflects an appropriate level of deference.

ARGUMENT

POINT I

SECTION 3 OF RLUIPA DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION

A religious accommodation is constitutional under the Establishment Clause if it serves a secular legislative purpose, has a primary effect that neither advances nor inhibits religion, and does not entangle church and state excessively. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-39 (1987) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). The Sixth Circuit found that section 3 failed this test because it has the primary effect of advancing religion. 349 F.3d at 264-67. This is so, according to the court, because the provision "giv[es] religious prisoners rights superior to those of nonreligious prisoners" by making it easier for prisoners to prevail on claims for religious accommodation than on other claims regarding fundamental rights. *Id.* at 266. The court also speculated that the prospect of these superior rights would "encourag[e] prisoners to become religious in order to enjoy greater rights." *Id.* As discussed below, the Sixth Circuit is wrong.

A. Section 3 Requires Only Religious Accommodation, Not Promotion of Religious Practices Unburdened by the State.

Contrary to the Sixth Circuit's suggestion, a law does not run afoul of the Establishment Clause simply because it lifts a government-imposed burden on religious exercise without simultaneously providing benefits to non-religious

activities. *Amos*, 483 U.S. at 338 ("Where, as here, government acts with the purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."). Religious accommodation — that is, "relieving people from generally applicable rules that interfere with their religious callings," *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J., joined by Stevens and O'Connor, JJ., concurring) — is quite different from government efforts to promote a religious practice that is unburdened by government rules. *Id.* at 627-29. Although section 3 grants exemptions to religious adherents that are not available to non-practitioners, this is a facet of any religious-accommodation scheme, including those that this Court has held to be constitutional. *See, e.g.*, *Amos*, 483 U.S. at 338 (holding constitutional the exemption of religious organizations from the federal ban on religious discrimination in employment); *Gillette v. United States*, 401 U.S. 437, 454 (1971) (holding constitutional the conscientious-objector exemption from military service); *Zorach*, 343 U.S. at 312 (holding constitutional a public school's practice of releasing students for off-site religious education).

Section 3 constitutes permissible religious accommodation because it requires accommodation only when the government has imposed a substantial burden on the inmate's religious exercise. It does not require special consideration for religious practices that are unburdened by the state. Rather, it simply allows practitioners to carry out their faith. *See Amos*, 483 U.S. at 337 ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose.").

Thus, section 3 is unlike the law at issue in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), which exempted religious publications promulgating teachings of the faith from the state

sales tax. As the plurality noted, the law provided a subsidy to religion that could not "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15. There was no evidence in that case that payment of the sales tax violated the religious beliefs of adherents or inhibited their religious activities. *Id.* at 18.

Moreover, section 3 applies equally to all religious practices, broadly covering "any exercise of religion." 42 U.S.C. § 2000cc-5(7)(A). No religious sect is privileged over another, nor is any specific religious practices singled out for special treatment. It is thus unlike the law in *Larson v. Valente*, 456 U.S. 228, 246 (1982), which created an impermissible interdenominational preference by imposing greater requirements on religious groups that solicited most of their funds from nonmembers than on other religious groups.

B. Section 3, Properly Applied, Will Not Induce Non-Adherents To Adopt Religious Beliefs.

The Sixth Circuit's fear that section 3 will induce inmates to become "religious" is unfounded. To begin with, section 3 does not reward prisoners who profess sham religious beliefs in order to gain rights not available to non-adherents. The law (consistent with standards arising from First Amendment jurisprudence) requires a prisoner to establish, as a threshold matter, that he or she sincerely holds the alleged religious belief. *See, e.g.*, *Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3d Cir. 1986) (affirming district court's finding that plaintiff did not sincerely believe in congregational prayer); *Theriault v. Carlson*, 495 F.2d 390, 394-95 (5th Cir. 1974) (remanding for district court to determine whether plaintiff's alleged religious beliefs were sincerely held);

Johnson v. Pa. Bureau of Corr., 661 F. Supp. 425, 437 (W.D. Pa. 1987) (holding that plaintiff did not sincerely believe in Muslim faith). Prisoners who purport to hold religious beliefs simply to gain additional rights will not be entitled to accommodation, because these sham beliefs are, by definition, not sincerely held.

Moreover, section 3 simply does not require accommodations giving religious prisoners such "superior rights" that their prospect would induce non-practitioners to adopt religious beliefs. Even under the strict-scrutiny standard, it is unlikely that prison officials would be required to provide accommodations only to religious prisoners where those accommodations would be highly desirable to non-religious prisoners as well, or where the accommodations would unduly burden non-adherents.

Applying a strict-scrutiny standard, this Court has refused to require accommodations that are likely to be in wide demand. For example, in *United States v. Lee*, 455 U.S. 252, 257-60 (1982), this Court refused to create religious-based exemptions to paying social security taxes, because virtually everyone would want such an exemption. Similarly, this Court refused to create an exemption to mandatory military service for religious-based objections to a particular war, noting that such an exemption might "weaken the resolve of those who otherwise would feel themselves bound to serve." *Gillette*, 401 U.S. at 459; *cf. TWA v. Hardison*, 432 U.S. 63, 80 (1977) (under religious-accommodation requirement of employment-discrimination law, private employer is not required to bump more senior employee from employee's preferred shift to accommodate religious practices of another employee). Other courts have reached similar results under state or federal religious-freedom laws requiring strict

scrutiny. *See, e.g., Larson v. Cooper*, 90 P.3d 125, 132-33 (Alaska 2004) (refusing to create a religious exemption to prison's policy on contact visits under the state constitution in part because other prisoners would inevitably demand similar exemptions); *State v. Balzer*, 954 P.2d 931, 941 (Wash. App. 1998) (refusing to create a religious exemption to marijuana laws under the state constitution because doing so would "encourage enlistment in those religions [that mandate marijuana use] for the wrong reasons"); *Hamilton v. Schriro*, 74 F.3d 1545, 1555 (8th Cir. 1996) (holding that prisoner was not entitled to construction of a sweat lodge under the federal Religious Freedom Restoration Act in part because of the potential effect on other inmates).

Instead, the accommodations that section 3 requires are by their nature likely to be of little value to anyone other than sincerely religious adherents. For example, courts have held that in the absence of other compelling interests such as excessive cost, Jewish prisoners are entitled to kosher meals. *See McEachin v. McGuinnis*, 357 F.3d 197, 203 & n.7 (2d Cir. 2004) (citing cases on religious dietary rules in prisons). As one commentator has noted, "[a]llowing Jewish prisoners a special diet will not encourage kosher eating (as long as the alternative meals are no better than the standard fare)." Michael W. McConnell, *Accommodation of Religion*, 60 Geo. Wash. L. Rev. 685, 701 (1992). Similarly, in the absence of security concerns or other compelling interests, section 3 might require a prison to allow access to religious texts and objects because such access would be of little value to nonbelievers. *See, e.g., Sutton v. Rasheed*, 323 F.3d 236, 253-58 (3d Cir. 2003) (holding that prisoners were entitled to religious literature under the First Amendment).

The risk that inmates will adopt (or purport to adopt) religious beliefs simply to obtain religious accommodations that other inmates are receiving is therefore low. Properly construed, section 3 merely allows those who hold sincere religious beliefs to exercise those beliefs without interference by the state. If section 3 has any effect at all of advancing religion, that effect is quite plainly secondary and due solely to the autonomous choices of prisoners.

POINT II

SECTION 3 IS INTENDED TO BE APPLIED WITH DEFERENCE TO THE CONSIDERED JUDGMENT OF STATE PRISON OFFICIALS

In its response to the petition for a writ of certiorari, Respondent State of Ohio stated that it had submitted in the court below a "comprehensive record of the real-world effects of RLUIPA in prisons." Br. in Response to Petition for a Writ of Cert. at 12. According to Ohio, RLUIPA imposes burdens upon prison officials and inmates, "who must face the security problems that result from RLUIPA's imposition." Br. in Response to Petition for a Writ of Cert. at 12. To be sure, the "real-world effects" of RLUIPA, and particularly lower courts' failure to defer to the considered judgment of prison officials, are a concern for all states. Section 3, however, does not require prison officials to offer accommodations that would compromise security, undermine discipline, demand excessive use of scarce resources, or prejudice the rights of other inmates. Rather, it calls for deference to the judgment of prison officials about these matters.

The legislative history leaves no doubt that Congress intended to limit section 3 in this manner. Section 3 is patterned after the Religious Freedom Restoration Act (RFRA). *See* 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady); 146 Cong. Rec. S7774 (joint statement of Sens. Hatch and Kennedy) (daily ed. July 27, 2000). RFRA, in turn, was intended to restore the standard that this Court applied in prison litigation before *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). *See* S. Rep. No. 103-111, at 10 (1993) ("The intent of the act is to restore traditional protection afforded to prisoners' claims prior to *O'Lone*, not to impose a more rigorous standard than the one that was applied."), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899; *see also* 139 Cong. Rec. S14362-65 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch). The pre-*O'Lone* standard was a form of strict scrutiny that gave strong deference to the judgment of state prison officials. *See Turner v. Safley*, 482 U.S. 78, 86-89 (1987) (surveying the Court's pre-1987 jurisprudence).

Congress explicitly endorsed this standard in enacting RLUIPA:

> The committee expects that courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.

146 Cong. Rec. at S7775 (joint statement of Sens. Hatch and Kennedy). The legislative history of RFRA similarly emphasizes the need for deference in the unique context of

prison management. Congress expressly disclaimed any standard that "would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner." S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. at 1899-1900. It intended that the courts apply the statutory standard in a "flexible" manner that is "sensitive to the demands of prison management." *Id.* at 11, 1993 U.S.C.C.A.N. at 1900-01. *See generally Lawson v. Singletary*, 85 F.3d 502, 508-11 (11th Cir. 1996) (examining legislative history of RFRA and concluding that deferential pre-*O'Lone* standard governs).

Deference is required at both stages of the analysis. First, the courts must defer to prison officials' judgment about what state interests are "compelling" in the prison setting. Thus, for example, security and discipline are both well-established compelling interests. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (holding that "maintaining institutional security and preserving internal order and discipline are essential goals" in the prison setting); *see also* 139 Cong. Rec. S14364 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (noting that "order, safety, and discipline" are compelling government interests in prison context); 139 Cong. Rec. S14466 (daily ed. Oct. 27, 1993) (statement of Sen. Hatfield) ("[a]ctivities that are dangerous or jeopardize discipline would still be subject to restriction under the compelling interest standard").

Second, courts must defer to the prison officials' judgment about the least restrictive means to serve these interests. *See Bell*, 441 U.S. at 547 ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline

and to maintain institutional security."). Thus, prison officials are not required to show with "certainty" that the policy is necessary to avoid some adverse outcome. *Procunier v. Martinez*, 416 U.S. 396, 414 (1974). Indeed, a prison's policy may pass the test of strict scrutiny even if there are, at least in theory, other "reasonable" ways of dealing with a situation. *Bell*, 441 U.S. at 554. Unless there is "substantial evidence in the record" that the officials have "exaggerated their response," the courts should defer to the prison administrators' decision. *Id.* at 548.

Importantly, the judgment about whether to provide a particular accommodation is made in the first instance by state prison officials. A prisoner may not sue under RLUIPA without first exhausting all available administrative remedies. 42 U.S.C. § 1997e(a), 2000cc-2(e); *see Porter v. Nussle*, 534 U.S. 516, 520 (2002). Thus, courts considering a suit demanding a religious accommodation will always have the benefit of the state prison officials' judgment, and can defer accordingly. Consistent with the principle of deference, RLUIPA also allows the state to exercise its discretion in choosing the method of accommodating a religious practice. 42 U.S.C. § 2000cc-3(e).[2]

2. Section 2000cc-3(e) provides:

> (e) Governmental discretion in alleviating burdens on religious exercise.
>
> A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

As Congress intended, the cases in which prisoners should prevail under section 3 are those challenging "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations." 146 Cong. Rec. at S7775 (joint statement of Sens. Hatch and Kennedy). To the extent that RLUIPA increases the state's obligation to accommodate religious practices, it does so with an eye towards preserving the traditional deference to the judgment of state prison officials.

A recent example from New York illustrates the role of deference in RLUIPA litigation. *See Marria v. Broaddus*, No. 97 civ 8297, 2004 U.S. Dist. LEXIS 14829 (S.D.N.Y. July 30, 2004), *appeal docketed*, No. 04-5538-pr (2d Cir. Oct. 19, 2004). *Marria* concerned an adherent of the Nation of Gods and Earths, a group commonly referred to as "Five Percenters." *Id.* at *1. After determining in the face of conflicting evidence that the Nation of Gods and Earths constituted a genuine religion, the court remanded the matter to the New York State Department of Correctional Services and deferred granting the relief requested by the inmate. *Id.* at *1-2. The court did so because it recognized that the Nation of Gods and Earths might be both a religion and a gang, in which case accommodation would implicate prison security. *Id.* at *5. In keeping with the tradition of deference and comity, the court asked the *prison* to determine, in the first instance, whether and how to accommodate the group's religious practices. *Id.* at *2-3 & n.2.

When the state prison officials submitted proposed protocols allowing adherents of the Nation of Gods and Earths access to certain literature and one-on-one meetings between inmates and outside volunteers affiliated with the

group but not allowing any group meetings or services, the court approved the protocols in their entirety. *Id.* at *3-4. In deferring to the prison administrators' judgment, the court noted that they had demonstrated that the requested group meetings would pose serious security and discipline problems, as well as financial hardship. *Id.* at *5-7. The court thus appropriately deferred to the officials' judgment about which practices could be accommodated and which could not, consistently with the prison's security interests and limited resources.

To be sure, some courts may fail to give the appropriate level of deference intended by Congress, making it more difficult for state prison administrators to run safe and efficient facilities. But that by itself does not make the statute constitutionally infirm. In any event, Ohio's primary concern seems not to be that the courts are requiring it to provide accommodations that compromise security. Rather, the "comprehensive record of the real-world effects of RLUIPA in prisons" that Ohio has compiled principally discusses the administrative resources expended in responding to prisoners' requests for accommodation and especially the ensuing litigation. *E.g.*, Aff. of David Schwartz, Religious Services Administrator for the South Region of the Ohio Department of Rehabilitation and Correction (Oct. 19, 2000) ¶¶ 3-4 (noting the increase in time spent responding to litigation and consulting staff on legal matters); Mem. from Kim Tucker, Deputy General Counsel, to Robert A. Butterworth, Attorney General of the State of Florida (July 19, 1996) (summarizing the preliminary results of a national survey and noting the increased cost in evaluating and litigating claims).

While frivolous prisoner litigation certainly burdens the state's administration of its prison system, it is not a basis for striking down section 3 on its face. Notably, suits under RLUIPA are subject to the Prisoner Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321. *See* 42 U.S.C. § 2000cc-2(e) (stating that nothing in RLUIPA shall be construed as amending or repealing the PLRA). Among other things, the PLRA requires mandatory exhaustion of administrative remedies, 42 U.S.C. § 1997e(a); requires a prisoner to pay the full filing fee for a lawsuit or appeal, 28 U.S.C. § 1915(b); limits the availability of money damages, 42 U.S.C. § 1997e(e); requires that prospective relief be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary," giving "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief," 18 U.S.C. § 3626(a)(1)(A); and allows a court to revoke a prisoner's good-time credit for presenting false information to the court, 28 U.S.C. § 1932. No one contends that these provisions have eliminated the problem of frivolous prisoner lawsuits. But this problem is best addressed through legislation like the PLRA, not by reading the Establishment Clause so broadly as to prevent governments from accommodating genuine religious practices.

CONCLUSION

For the foregoing reasons, Amici States respectfully request that this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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